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# In the Supreme Court

of the

# United States

OCTOBER TERM, 1967

**No. 921**

MARVIN S. SAMUELS,
*Petitioner,*

vs.

THE STATE OF CALIFORNIA,
*Respondent.*

## Opposition of Respondent to Petition for Writ of Certiorari

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## SUBJECT INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement of the Facts | 3 |
| Summary of Argument | 12 |
| Argument | 13 |
| I. There Is No Record Evidence That the Prosecuting Attorney Concealed or Suppressed Applicable Defense Evidence | 13 |
| II. The Reversal of the Conspiracy Convictions Does Not Require Reversal of the Assault Conviction | 15 |
| III. The Evidence Was Sufficient to Support the Conviction of Assault | 16 |
| IV. No Search and Seizure Issues Are Properly Presented | 17 |
| V. Petitioner's Other Contentions Also Fail to Present Substantial Federal Questions | 18 |
| Conclusion | 19 |

## TABLE OF AUTHORITIES CITED


| Cases | Pages |
|---|---|
| Giles v. Maryland, 386 U.S. 66 (1967) | 13, 15 |
| In re Klor, 64 Cal.2d 816, 415 P.2d 791, 51 Cal.Rptr. 903 (1966) | 16 |
| Miller v. Pate, 386 U.S. 1 (1967) | 15 |
| Schmerber v. California, 384 U.S. 757 (1966) | 19 |
| Warden v. Hayden, 387 U.S. 294 (1967) | 18 |

| Codes | |
|---|---|
| California Penal Code: | |
| Section 311.2 | 15, 16 |
| Section 311.9 | 15 |

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### OPINION BELOW

Op April 28, 1967, the Court of Appeal of the State of California, First Appellate District, Division Two, issued its opinion affirming the conviction of petitioner Marvin S. Samuels, in the Superior Court of Santa Clara County, of the felony of assault by means of force likely to cause great bodily injury (Cal. Pen. Code § 245), and reversing the convictions of petitioner in the same court of the felonies of conspiracy to prepare and distribute obscene matter (Cal. Pen. Code § 311.2). The opinion is officially reported at 58 Cal. Rptr. 439; 250 A.C.A. 571 (1967).

A petition for rehearing by petitioner was denied by the California Court of Appeal on May 26, 1967; petitioner's application for hearing in the California Supreme Court was denied on July 19, 1967. These orders are not officially reported.

## JURISDICTION

Petitioner has invoked the jurisdiction of this Court under Title 28, United States Code section 1257(3).

## QUESTIONS PRESENTED

1. Whether the prosecuting attorney wilfully concealed or suppressed applicable defense evidence unknown to petitioner and his trial counsel.

2. Whether the prosecuting attorney knowingly made false statements in his closing argument and thereby wilfully misled the court.

3. Whether the prosecuting attorney suppressed facts and thereby violated the California State Bar Act and Rules of Professional Conduct.

4. Whether the prosecuting attorney charged petitioner with criminal counts under an unconstitutional state statute which resulted in petitioner receiving an unfair trial in violation of the Fourteenth Amendment.

5. Whether petitioner was convicted of assault by means of force likely to cause great bodily harm without evidence of a victim, without complaint of a victim and without a corpus delicti, in violation of the Fourteenth Amendment.

6. Whether evidence was used against petitioner which was obtained by an unreasonable search and seizure in violation of the Fourth Amendment.

7. Whether non-contraband material was seized from petitioner in a search incidental to his arrest and such seizure was unreasonable.

8. Whether the prosecutor procured petitioner's arrest based on information charging assault by means of force likely to cause great bodily harm from an inferior court after the grand jury had refused to indict, in violation of the Fifth Amendment.

9. Whether the trial court erred in permitting double hearsay statements about petitioner's reputation as a sadist to be introduced into evidence.

10. Whether sui juris parties may enter into a valid sadomasochistic relationship where the acts are in private with no opportunity for the public to know of their existence by any means.

11. Whether petitioner received an unfair trial because of an undue amount of sensational publicity, even though he did not seek a change in venue.

## STATEMENT OF THE FACTS

Petitioner was a medical doctor specially trained in the field of ophthalmology (RT 1156-1157, 1224). He practiced in Mountain View, California, and resided in Sunnyvale, California (RT 61, 1156). Photography had been a hobby of his for many years (RT 1190). He was also keenly interested in sadomasochistic activity, recognizing in himself the symptoms of this abberation (RT 1223-1229). Moreover, he was the author of many articles on the latter subject, under the pseudonym "Michael S. Sands, M.D.", which articles appeared primarily in nudist magazines (RT 1229-1230). He had been involved years before in the production of several sadomasochistic films on the East Coast (RT 1233, 1265-1276).

In early September, 1964, petitioner met Kenneth Anger, a film producer-director, at an "after-hours" coffee shop in San Francisco (RT 624-627). Petitioner told Anger that he

had three rolls of film dealing with sadomasochism which he wished developed (RT 627). Anger volunteered to get the film developed and gave petitioner his Hollywood address.

In the middle of September 1964, petitioner mailed the three rolls of film to Anger in Hollywood (RT 630-631). They were sent to Film Service Laboratory in Hollywood where Anger had an account (RT 631-632). They were developed and returned to Anger about three days later (RT 632).

Anger examined the films on a viewer (RT 632). One roll was badly underexposed. The other two rolls were slightly underexposed but visible. Anger advised Dr. Gebhardt of the Kinsey Institute about the latter rolls and sent them to him (RT 632-633). The dark roll was mailed to petitioner (RT 634). When the other two rolls were returned to Anger by the Kinsey Institute, they were then mailed to petitioner (RT 634-635). Anger did not advise petitioner that he had sent them to the Kinsey Institute (RT 642-643, 693).

Petitioner and Anger met again in San Francisco in early November 1964 (RT 636-638). After dinner in San Francisco, petitioner invited Anger to his home in Sunnyvale (RT 638).

In the course of the evening petitioner told Anger that the three rolls he had sent to him for development had been made in the house (RT 638-639). He said that he intended to take more sadmasochistic films, using a room in the house, specially insulated and padded and equipped with eye bolts fastened to the ceiling, for the filming (RT 546-547, 638, 648-649, 667-668, 983). He also told Anger that a masochist was coming from out of state to be in the film and that he intended to make one or two rolls with this person (RT 641). Anger responded that such film would interest the Kinsey Institute and asked petitioner if he would donate the footage (RT 642). Petitioner was apparently agreeable

to this idea (RT 642-643). When photographed, petitioner would send the films to Anger (RT 640).

Petitioner projected the two rolls previously developed in Hollywood (RT 644). They were now spliced together and Anger observed that a single scene of a solitary figure, flexing muscles and wielding a whip, was cut up and inserted at different places (RT 644). The whipper was in profile and naked from the waist on up (RT 645). The other part of the composite film depicted a beating being administered upon a victim horizontally bound on a bed and an act of sodomy on this victim (RT 961-963). This film was the same one which Anger had seen, as two rolls, in Hollywood (RT 669-670, 682). Petitioner also showed Anger the special props he had in his home, including restraining belts and whips (RT 691, 703). They were stored in the study (RT 691).

Anger's next contact with petitioner was when he received a package in the mail containing two rolls of undeveloped film (RT 653-654). Anger deposited the rolls at Schaefer's Camera Store in San Francisco, using the fictitious name "Jackson" and giving a false address (RT 654). Several days later he picked up one roll and paid the developing charge.

Rudolph Stohr was a plant supervisor at Eastman Kodak Company in Palo Alto (RT 710). The other roll of film deposited by Anger in San Francisco, and sent to Kodak by Schaefer's Camera Store, was referred to him on November 17, 1964, by an employee (RT 712, 737). This film was the basis for the aggravated assault conviction. In the record it is referred to as the "vertical" film because it displays a nude man vertically suspended from the ceiling of an insulated room and being whipped by petitioner. Stohr projected it and then called the Palo Alto Police Department (RT 713-714). The film was projected for Lieutenant Ray

of the department and for Deputy District Attorney Himmelsbach of Santa Clara County (RT 714, 737). On November 18, 1964, Inspector Rudolph Nieto of the Sex Crimes Detail of the San Francisco Police Department, and Deputy District Attorney Frank Shaw of San Francisco County came to the Kodak plant to view the film (RT 714, 732, 997). Nieto concluded that the film was obscene and that it indicated a violation of law or an aggravated assault (RT 998). Stohr turned the film over to Nieto (RT 716).

Nieto left a dummy roll of film at Schaefer's Camera Store (RT 975). On the morning of November 20, 1964, Anger picked up this dummy roll at Schaefer's (RT 656-657, 975-976, 999). He was apprehended outside the store by Nieto and Inspector Lusher, also of the San Francisco Police Department (RT 657, 975-976). The film obtained by Nieto from Kodak was projected at the Hall of Justice and Anger explained its source (RT 662, 975-976).

At about 5:00 p.m. Lusher called Douglas Logan, Chief Investigator for the Santa Clara District Attorney, and advised him about the film and petitioner (RT 566-567). Petitioner's occupation and address was verified, and a search warrant for petitioner's residence and office was obtained about 6:00 p.m. (RT 62, 549, 566-567). Meanwhile, Nieto, Lusher and Anger left San Francsico for San Jose to meet with Logan in the District Attorney's office (RT 977). John Williams and Inspector Walter Ihle, both of the San Francisco Police Department Crime Laboratory, also proceeded to the meeting (RT 977). All arrived at the District Attorney's office about 7:30-8:00 p.m. (RT 568,977). They viewed the so-called "vertical" film, and Anger again described the nature of the photographed activity (RT 529, 569, 977).

This "vertical" film, upon which the conviction rests, shows a gagged and naked man strung up in an insulated

room, with his back toward the camera, receiving a beating from petitioner with whips and lashes (RT 572, 679). The beating produced welts on the buttocks, on the small of the back, and on up the body (RT 1014). In the course of the film petitioner reaches around the front of the restrained victim and appears to fondle the victim's private parts (RT 1291-1292). The film contained no splices (RT 754).

After viewing the film Logan feared that the victim was dead as a result of the attack (RT 580-581). All the officers proceeded from the District Attorney's office to petitioner's Sunnyvale residence, and arrived there at 9:00 p.m. (RT 36, 977). Also accompanying them were Deputy District Attorneys Himmelsbach and Moore, and Officer Aebersold of the Sunnyvale Department of Public Safety (RT 36-37).

Logan, Lusher and Nieto went up to the house first (RT 978). Petitioner opened the door (RT 37, 978). Logan advised petitioner that he had a search warrant, described the warrant, read it and handed it to appellant (RT 38, 535, 978). Petitioner read the document and let the three officers in.

The house was in semi-darkness, the only light coming from the kitchen (RT 38, 558, 978). A man, later identified as William Corman, was sitting on a couch in the darkened living room (RT 38-39, 979). A movie screen was set up in the living room and a projector was on the dining room table (RT 38, 530-531, 979). Nieto observed two cannisters of film on the table by the projector (RT 52-53, 979). These cannisters were later noticed by Logan as well (RT 38, 55, 530, 559-566).

Logan, after showing the warrant to petitioner, turned his attention to Corman and questioned him for several minutes (RT 59, 560-561). Meanwhile, Nieto went into the bedroom and petitioner accompanied him (RT 979-980). Within five or six minutes, Logan joined them in the bed-

room. He immediately advised petitioner of his constitutional rights (RT 563, 979-980, 1005-1006, 1097). No threats or promises were made (RT 1092-1094). Logan asked petitioner if he knew the name of the person suspended from the beams (RT 1094). Petitioner said he had met him in a bar in San Francisco (RT 1094). He said the beating had taken place in the padded room between the bedroom and the living room (RT 1094). He explained that there was no third party involved because his camera operated automatically (RT 1094-1095). Then he said he wouldn't say anything more until he consulted an attorney (RT 1095). The conversation consumed 5-10 minutes (RT 1099).

Nieto left the bedroom, entered the living room and talked with Corman (RT 1005-1006). He then went outside the house, checked the cars parked in the driveway and in front of the house and told Williams and Ihle to come in (RT 1005-1006). Nieto reentered the bedroom and had his first conversation with petitioner at about 9:30 p.m. (RT 980, 1007).

Nieto told petitioner that he had seen a film where a man was manacled to the ceiling and was being beaten. He asked where this had occurred and petitioner indicated the insulated and padded room (RT 981). Petitioner said he had met the victim in a "gay" bar in San Francisco. Then he said he met the man, whom he knew as "George", at Foster's Restaurant in San Francisco (RT 982-983). He described the man as a masochist who had voluntarily submitted to the beating (RT 982-983). Petitioner identified himself as the sadist in the movie and as being well-known as a sadist (RT 983, 1009). He then explained how he had used adhesive tape as a gag on the victim's face (RT 982-983). He also told Nieto that he had studied law for two years (RT 1007-1008).

Nieto went with petitioner into the special room (RT 982-984). Nieto observed the eye bolts attached to the ceiling of the room (RT 982-983). He asked petitioner how the victims feet had been anchored. Petitioner said the feet had been strapped to the studs on either side of the room (RT 983-984).

A thorough search was conducted in the house. Among the items seized were a projector, movie screen, two tripods, movie camera, voltage converter, film editor, and movie lights. The officers also found a switch, whip, black leather belt, motorcycle hat, black leather jockstrap, restraining belt, belt with a lock, and a glove. The officers also seized the film on the projector table. Logan took custody of these items (RT 991, 1095).

During the evening Logan had a further conversation with petitioner who told him that he was a law student and knew the officers couldn't do anything because the victim was a willing partner (RT 1097-1098). Petitioner told Nieto that he had been watching or projecting the film "Fire Island" before the officers arrived (RT 1021). Corman had made a similar statement to Logan (RT 561). Nieto indicated his concern as to whether the victim in the vertical film was alive and petitioner replied that he was (RT 1112-1114).

Petitioner was arrested around 10:30 p.m., just prior to the time the officers left his residence (RT 58, 564, 984, 1095). They proceeded with him to his office in Mountain View where the search continued (RT 61, 65, 565, 984). Nothing was seized (RT 61, 984). He was booked at the Sunnyvale Department of Public Safety at 11:40 p.m. (RT 565).

Lowell W. Bradford was Director of the Laboratory of Criminalistics for Santa Clara County (RT 753). He examined the vertical film and found no splices in it (RT 753-

754). The film was approximately 100 feet long. Bradford extracted certain sections from the film by way of color slides which were then made into prints (RT 800-801). Taking a particular section of the film, which showed part of the beating, he concluded that the camera had not been stopped at any time between the beginning and end of the section (RT 818, 819, 891). From examining the pictures he formed the opinion that no cosmetics had been used on the victim and that the marks and welts which appeared on the victim occured there progressively, frame by frame. The section showed the lash in motion directed towards the back of the subject in each frame. The movement of the lash was so rapid that it was not completely stopped by the camera. The black line of the lash appeared in each picture (RT 819-820). The pictures also showed the progressive development of the wounds in size and color without evidence of camera stops (RT 820-824).

Bradford examined the film for evidence of retouching (RT 803, 830). The film was checked by viewer and by microscope (RT 802). Bradford concluded that there was no retouching and expressed the opinion that the film truly and correctly represented what was in front of the camera (RT 803, 830).

Edward Chong, Senior County Photographer, was of the same opinion (RT 1056-1057). Rudolph Stohr, the Kodak supervisor, was also of the opinion that the camera actually took or depicted what was taking place (RT 726). He found no evidence of alteration or retouching of the film (RT 726).

Logan was of the opinion that the room used for the vertical beating was the insulated room in the house (RT 581-582). The room also contained two loose wires which, when touched together, operated a locking mechanism in

the door frame. New walls had been constructed over the existing walls (RT 536-539, 546,547, 648-650, 1018).

Logan and Nieto were concerned about the whereabouts of the victim (RT 1021-1022). Efforts were made to locate and identify the victim (RT 1020-1022, 1025-1026). On cross-examination, defense counsel elicited from Nieto that his subsequent investigation disclosed that petitioner had been previously arrested in Texas for oral copulation (RT 1023).

About a week after the arrest, petitioner phoned Anger and admonished him for talking to the police (RT 670-671).

Petitioner testified in his own behalf (RT 1156).

He stated that the film was made in his home in early September 1964 (RT 1195), about a week to ten days prior to the arrest (RT 1217). The masochist was picked up at a bus depot in San Jose. He was strung up with hospital restraints and lightly tapped with a riding crop. The camera was stopped periodically and cosmetics were applied. The victim was coached to move violently to feign pain. He hung there for about four hours (RT 1219-1222). Petitioner administered the beating dressed in a black leather jockstrap, motorcycle boots and a motorcycle hat (RT 1241-1242). No cosmetics, however, were found on the numerous torture instruments used by petitioner.

Petitioner's testimony respecting the arrest and search varied considerably from the testimony of the officers. According to the petitioner the officers came to his home around 8:00 p.m. The house was adequately lighted. The search warrant was not read to him but merely handed to him, and he read only the typed-in print (RT 1161-1163). At this time the projector was still in his study closed, though he was intending to show Corman, a patient being fitted with contact lenses, the film "Fire Island" (RT 1160-1163).

His versions of the conversations also differed from the testimony of the officers. According to petitioner, he was not advised of his rights until about 10:00 p.m., although he admitted knowing of his rights (RT 1167).

John Barnes, a professional photographer, testified for the defense. He stated that petitioner's camera can be stopped without any indication of a stoppage on the films, such as a blank frame caused by an open shutter (RT 1394). The prosecution established that Barnes was on probation for grand theft committed in a camera store (RT 1379).

Dr. Robert Malone, a surgeon and physician for a high school football team, viewed the "vertical" file shortly before he testified and was of the opinion that while the marks on the victim were in part caused by the blows, not all the color changes and marks were so caused (RT 1410).

William Corman testified for the defense that the police arrived at petitioner's home about 8:00 p.m.; that the projector was not set up; that the officers left about 11:00 p.m. (RT 1460, 1461, 1472).

## SUMMARY OF ARGUMENT

Petitioner's allegations totally fail to present any substantial federal questions. His reference to an allegedly suppressed letter and to the prosecuting attorney's alleged actions in securing the amended indictment and information are matters outside this record and not properly before the Court on a certiorari petition.

Petitioner was validly convicted of assault by means of force likely to cause great bodily injury, and that conviction is supported by the evidence and is not connected with the allegedly suppressed letter or the purported unreasonable search and seizure. Moreover, the reversal of the conspiracy

convictions by the California Court of Appeal did not require that court to afford petitioner a new trial on the assault conviction which it affirmed.

## ARGUMENT

### I. There Is No Record Evidence That the Prosecuting Attorney Concealed or Suppressed Applicable Defense Evidence.

Petitioner alleges that the prosecutor had in his possession, and suppressed, a letter from the Kinsey Institute to prosecution witness Anger, which document was valuable to the defense and unknown at trial to petitioner and his counsel. The letter is not part of the trial record. What purports to be the content of the letter is set out in the petition at pages 4 and 5.

The question raised by petitioner, of course, cannot be determined on the record before this Court because that record is silent respecting the alleged letter. Petitioner's remedy is not by a writ of certiorari to review his direct appeal from the judgment of conviction but by post-conviction proceedings such as utilized in the cases he cites: *Giles v. Maryland,* 386 U.S. 66 (1967), and *Miller v. Pate,* 386 U.S. 1 (1967). Nevertheless, some observations respecting this contention are in order.

Accepting the purported letter at face value, it is apparent that it is unrelated to the "vertical" film upon which petitioner's conviction of assault is based. However, it may refer to the two rolls of film which Anger sent to the Kinsey Institute after they were developed in Hollywood (RT 630-635). The film upon which the assault conviction rests was obtained directly from the Eastman Kodak laboratory in Palo Alto after development and never went to the Kinsey Institute (RT 712-716). Consequently, there is absolutely no relevance of this letter to the assault conviction which petitioner seeks to have reviewed by this Court.

The record, though silent regarding any letter, does disclose that Anger sent the two rolls of film developed in Hollywood to the Kinsey Institute without the knowledge of petitioner (RT 642-643, 693). Anger further testified that the two rolls were immediately returned to him by Dr. Gebhardt of the Kinsey Institute (RT 634-635). Defense counsel cross-examined Anger at length and made no attempt to elicit from him anything concerning a letter from Dr. Gebhardt or anything concerning the reaction of the Kinsey Institute to the films (RT 680-702, 706-608). Indeed, since petitioner had no knowledge that the films were even reviewed by the Institute, we can perceive nothing of value for the defense in the letter. The letter merely advises Anger that "Bill" would return some film and states that it was of "definite interest." The prosecuting attorney's argument that there was no evidence in the case that petitioner had any contact with the Kinsey Institute was accurate, even taking into consideration the purported letter between Dr. Gebhardt and Anger concerning a transaction which did not involve petitioner.

Petitioner contends that the prosecutor did "wilfully mislead the Court" by the above argument. Apparently he means "jury" rather than "court," since petitioner was convicted by a jury. We see no misleading of the jury, wilful or otherwise, in the prosecutor's argument since the argument is a fair statement of the record evidence. Moreover, the further contention that the prosecutor violated the California State Bar Act and Rules of Professional Conduct certainly does not raise any federal question.

The letter may have had some remote connection with the conspiracy prosecutions inasmuch as the defense contended that petitioner's films were produced for legitimate scientific purposes which, if proven, would have been a

complete defense to the conspiracy charges (Cal. Pen. Code § 311.9). The conspiracy convictions were reversed on appeal and the defense of scientific purpose has no application whatsoever to the assault conviction which was affirmed.

The cases cited by petitioner do not help him. In *Giles v. Maryland*, 386 U.S. 66 (1967), the credibility of the prosecuting witness in a rape case was at issue at trial and this Court remanded the case for further evidentiary proceedings on the question of whether the prosecution suppressed evidence relating to the credibility of the witness or allowed false testimony to remain uncorrected in the record. In *Miller v. Pate*, 386 U.S. 1 (1967), a murder case, this Court found that the prosecution's theory at trial was that the murder took place in the course of a sexual attack and that the stains on the defendant's shorts were human blood. The prosecutor knew at the time that the stains were actually paint and not blood. Consequently, the conviction was reversed because it was obtained by the knowing use of false evidence. In both cases there was a direct connection between the allegedly suppressed evidence and the convictions being attacked. Here, there is no such relationship for the allegedly suppressed letter was irrelevant to the assault prosecution.

## II. The Reversal of the Conspiracy Convictions Does Not Require Reversal of the Assult Conviction.

Petitioner contends that the state statute under which he was charged on the conspiracy count was unconstitutional and that petitioner was entitled to a new trial on the assault charge without the "now dismissed inflammatory and unconstitutional counts."

Petitioner was charged with two counts of conspiracy to violate California Penal Code section 311.2, which provided then and still provides:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute, any obscene matter is guilty of a misdemeanor."

The jury was instructed that a violation of the statute would occur upon a mere showing of the preparation of obscene materials. Subsequent to the trial, however, the California Supreme Court, in *In re Klor*, 64 Cal.2d 816, 415 P.2d 791, 51 Cal.Rptr. 903 (1966), held that section 311.2 does not penalize the mere preparation of obscene material without the intent to disseminate or distribute such material. Consequently, the obscenity convictions were reversed because the case was tried upon an unconstitutional construction of the statute. However, at the time the prosecutor brought the conspiracy charges against petitioner, the statute was not "clearly unconstitutional" as petitioner argues.

The petitioner here was validly charged with the two conspiracy counts, as well as two assault counts and one sodomy count. The fact that his conviction on one of the assault charges remains the only standing conviction does not mean he was the victim, using petitioner's words, of "overbooking and over charging." Moreover, the argument that some unspecified prejudice seeped over from the consipracy prosecution to taint the assault prosecution was not raised in the court below.

### III. The Evidence Was Sufficient to Support the Conviction of Assault.

Petitioner contends that the assault conviction cannot stand "where there never was a 'victim'; where there was

no complaint; where there was no corpus delicti." We ask what better evidence of an assault is there than an authenticated movie of the actual crime as it was committed?

The film depicts the gagged and helpless victim suspended by his hands from the ceiling of an insulated room. Petitioner is identified as, and admitted to being, the wielder of the whip. The victim squirms in agony as petitioner brings the whip to the victim's body and carries out a prolonged and vicious beating.

No less than three qualified photography experts testified that the film accurately depicted the actual event taking place in front of the camera. There were no splices or camera stops in the film; there was no evidence of retouching or tampering; there was nothing to indicate cosmetics were used to produce the wounds upon the victim's body.

Petitioner argues that the victim entered into a valid sadomasochistic relationship with petitioner, and the acts, committed in private, were not criminal. Of course, the victim was not produced and, consequently, there is no evidence that the victim actually consented to the aggravated beating he received. The bound and gagged victim was hardly in a position to give or take away any consent to the assault. Once suspended from the ceiling, he was at the "mercy" of petitioner.

Even if it be assumed that the victim consented to the use upon him of force likely to produce great bodily harm, petitioner's conduct in inflicting the beating was nevertheless violative of the assault statute which was obviously designed to prohibit one human being from severely or mortally injurying another.

**IV. No Search and Seizure Issues Are Properly Presented.**

The film of the "vertical" beating was not seized from petitioner but was obtained by the authorities from the

Eastman Kodak Company after processing. Nevertheless, petitioner complains about the search of his home that produced the other film which was the basis of one of the conspiracy counts now reversed. Accordingly, there is no search and seizure problem connected with the assault conviction.

The search of Petitioner's home was pursuant to a search warrant (RT 62, 141, 549, 566-567). While the search warrant described only "instruments of torture", the officers were not restricted, as petitioner suggests, to seizing only contraband, fruits or instrumentalities of the crime. The distinction prohibiting seizure of items of only evidential value is no longer accepted as being required by the Fourth Amendment. *Warden v. Hayden,* 387 U.S. 294 (1967). The seizure of evidence from petitioner's home, assuming that it has some relationship to the assault conviction, was proper pursuant to the warrant or, in the alternative, as incidental to his arrest after discovery of the specified "instruments of torture."

## V. Petitioner's Other Contentions Also Fail to Present Substantial Federal Questions.

Petitioner contends that the trial court permitted into evidence "double hearsay" statements about petitioner's reputation as a sadist (See RT 127, 153-154). There was no objection by defense counsel to this testimony. The admissibility of such evidence, of course, only involves state law or state procedure. It is also contended that petitioner's trial was unfair because of alleged sensational pretrial publicity. Again, there was no complaint about publicity made to the trial court and no motion to change venue. The trial jurors were repeatedly admonished throughout the proceedings to avoid such influences. The failure of defense counsel to object to the purported "double hearsay" and to the alleged "sensational publicity" forecloses petitioner's

contention that some federal question is at issue in these matters. *Schmerber v. California,* 384 U.S. 757, 765-766, fn. 9 (1966).

Petitioner was indicted by the grand jury and also held to answer after a preliminary hearing in the municipal court. He was arraigned on an amended indictment and information (CT 7-11). The transcripts of the proceedings before the grand jury and the municipal court are not parts of the appellate record and, consequently, petitioner's allegation that the grand jury refused to indict him on the assault charge is unsubstantiated.

The facts are that petitioner was indicted by the grand jury on two counts of conspiracy and one count of sodomy, and was held to answer after preliminary hearing on the same charges plus two counts of assault. The accusatory pleading which resulted merely brought petitioner before the superior court for trial. His conviction rests upon the record evidence and not upon any evidence or lack of evidence before the grand jury or municipal court.

## CONCLUSION

We respectfully submit that petitioner's application for a writ or certiorari should be denied.

Dated, San Francisco, California,
April 3, 1968.

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